SUPREME COURT OF KENTUCKY
CASE NO. 2015-SC-000144

MARY E. MCCANN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED — **APPELLANT**

v.

ON DISCRETIONARY REVIEW FROM THE KENTUCKY COURT OF APPEALS
CASE NO. 2014-CA-000392

THE SULLIVAN UNIVERSITY SYSTEM, INC., D/B/A SULLIVAN UNIVERSITY COLLEGE OF PHARMACY, et al — **APPELLEES**

** ** ** **

AMICI CURIAE BRIEF OF KENTUCKY EQUAL JUSTICE CENTER AND JOBS WITH JUSTICE:

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 2016, ten (10) original copies of this brief were served in person upon Susan Stokely Clary, Clerk of Supreme Court of Kentucky State Capitol, Room 235, 700 Capitol Avenue, Frankfort, KY 40601-3415, and one (1) copy served via regular U.S. mail to: Theodore W. Walton and Garry R. Adams, Counsel for Appellant, Clay Daniel Walton & Adams, PLC, 462 S. 4th St., Louisville, KY 40202; and Grover C. Potts, Michelle D. Wyrick, Rania M. Basha, and Emily C. Lamb, Counsel for Appellants, Wyatt Tarrant & Combs, LLP, 500 W. Jefferson Street, Suite 2800, Louisville, KY 40202.

MCKENZIE CANTRELL

STATEMENT OF POINTS AND AUTHORITIES

INRODUCTION[1]

This case presents an issue of statutory interpretation that will, in reality, decide whether companies who underpay employee wages can be held civilly accountable when that theft is systemic and affects enough employees to qualify as a class or collective action. Employees have brought wage claims in class form in Kentucky for over a century. *See Bridges v. F. H. McGraw & Co.*, 302 S.W.2d 109, 113-14 (Ky. 1957) (holding that justiciable interests by employees to receive their unpaid wages merited a class action to determine "the extent of having the court construe the bargaining agreement, . . . to declare the rights of the employer and employees generally in respect to recovery or non-recovery, and to require disclosure to the extent the court in its reasonable discretion deems right and proper."); *Gorley, et al. v. City of Louisville*, 65 S.W. 844, 847 (Ky. Ct. App. 1901) (allowing a class action, preceding the enactment of the Kentucky Wage and Hour Act, by city police officers seeking unpaid wages owed by the city employer). Until *Toyota Motor Mfg., Ky. v. Kelley*, 2013 Ky. App. Unpub. LEXIS 910 (Ky. Ct. App. Nov. 15, 2013), KRS Chapter 337 had been widely utilized to allow class action litigation of wage and hour claims. Dicta in *Kelley* and the Court of Appeals' holding in this case have resulted in substantial uncertainty concerning the options employees have when their employer underpays wages. Part I of this brief sets out the disproportionate impact and continued uncertainty that would exist for low income workers if the Court of Appeals' decision in this case is affirmed. Part II summarizes decisions other states have made when its courts have encountered the question of the availability of class or collective actions under the state wage and hour statutory scheme. Part III emphasizes Kentucky constitutional law and the role of the doctrine of fundamental fairness in the analysis.

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[1] Counsel would like to acknowledge and thank Carolyn Purcell, University of Louisville J.D. Candidate 2016 for her contributions to the content of this brief.

PURPOSE AND INTEREST OF *AMICI CURIAE*

Formed in 1976, *amicus curiae* Kentucky Equal Justice Center (KEJC) is a non-profit civil legal aid organization and advocate for low income Kentuckians. KEJC's Employment Law Project advocates for policy changes at all levels of government, especially at the state and local level. This project also litigates wage and hour cases and educates and advises low income and immigrant communities across the Commonwealth about employment-related matters. This hybrid of functions gives KEJC the unique experience of interacting with individuals who would be affected by the Court's ruling in this case. It is KEJC's position that low income employees would be disproportionately impacted if the Court affirmed the Court of Appeals' decision because these workers would be unable to join together to receive quality representation and compensation for their claims.

Amicus curiae Jobs with Justice is a national network of local coalitions that bring together community, labor, student, and faith organizations that seek to educate and mobilize the public on issues of workers' rights. Since its founding in 1987, Jobs with Justice has fought for working people by advancing a sustainable and powerful network of grassroots coalitions; supporting the growth and leadership of local leaders; and developing strategic alliances nationally and globally that strengthen the movement for workers' rights, economic justice, and our democracy. Jobs with Justice has a Kentucky chapter with operations based in Louisville. Jobs with Justice joins this brief out of concern that a decision in this case could limit access to the courts for low income employees with significant economic losses.

Both KEJC and Jobs with Justice believe that some employers have a systemic problem of depriving workers of wages legally owed to them, a practice known as "wage theft." By limiting the availability of wage and hour class actions under KRS Chapter 337 and Kentucky Rule of Civil

Procedure 23, the Court would administratively burden the lower courts and deprive workers of the specialized counsel, enhanced credibility and procedural flexibility that the class or collective action offers.

ARGUMENT

I. WAGE THEFT IS A NATIONAL EPIDEMIC THAT SIGNIFICANTLY IMPACTS WORKERS IN ALL SECTORS

A. National Studies Show that Workers are Losing Billions Per Year in Earned Wages

Wage theft – shortchanging workers of the wages they are legally owed – is a trend in the 21st century labor market. It takes many forms, including being paid less than the minimum wage or other agreed upon wage, working "off-the-clock" without pay, getting less than time-and-a half for overtime hours, having tips stolen or illegally pooled, being misclassified as an "independent contractor" instead of as an employee and consequently being underpaid, having illegal deductions taken out of paychecks, not being paid the prevailing wage on a public works project, not being paid the last paycheck after job separation, or simply not being paid at all.

A growing body of research documents a wage theft crisis in the United States across all industries and geographic regions. These studies show that wage theft takes place in industries that span the economy, including retail, restaurant and grocery stores; caregiver industries such as home health care and domestic work; blue collar industries such as manufacturing, construction and wholesalers; building services such as janitorial and security; and personal services such as dry cleaning and laundry, car washes, and beauty and nail salons. These studies use various survey-based methodologies to document the problem.[2]

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[2] For a helpful summary of the body of recent research on wage and hour violations in the United States, *see* "Winning Wage Justice: A Summary of Research on Wage and Hour Violations in the United States," National Employment Law Project (July 2013). Available at: http://www.nelp.org/content/uploads/2015/03/WinningWageJusticeSummaryofResearchonWageTheft.pdf.

Wage theft in America conservatively affects millions of people and costs workers billions of dollars annually. Nationally, it is estimated that workers are not paid at least $19 billion every year in overtime, and in the U.S. $40 to $60 billion in total are lost annually due to all forms of wage theft. *See* Brady Meixell and Ross Eisenbrey, "An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year," Economic Policy Institute (Sept. 11, 2014).[3] According to the report, "a transfer from low-income employees to business owners worsens income inequality, hurts workers and their families, and damages the sense of fairness and justice that a democracy needs to survive." *Id.*

An influential national study surveying 4,307 low-wage workers in New York, Chicago and Los Angeles found that twenty-six percent of workers surveyed were not paid the applicable minimum wage, seventy-six percent were not paid overtime in the previous week, and fifty-seven percent did not receive written documentation of wages, rates of pay, and hours worked. Seventy percent of workers suffered from "off-the-clock" violations by not being compensated for all hours worked. More than two-thirds of surveyed workers who were legally entitled to a meal break did not receive one, had their break shortened, or were interrupted by their employer. Thirty percent of tipped workers surveyed were not paid the tipped worker minimum wage, and twelve percent of tipped workers had their tips stolen by management. Twenty percent of all workers surveyed reported that they had complained to their employer in some way, and forty-three percent of those who complained experienced illegal retaliation by their employer or supervisor, such as firing or suspension, threatening to call immigration authorities, or cutting pay. Annette Bernhardt, Ruth Milkman, Nik Theodore et al., "Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities," A joint project of the Center for Urban and Economic

[3] Available at: http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/.

Development at the University of Illinois at Chicago, the National Employment Law Project and the UCLA Institute for Research on Labor and Employment. (Sept. 2009).[4]

In the South, a survey of over five hundred low-income Hispanic immigrants in Nashville, Charlotte, New Orleans, rural southern Georgia, and several towns and cities in northern Alabama found that forty-one percent had experienced wage theft. In New Orleans, eighty percent reported wage theft. Workers surveyed worked in agriculture, construction, hospitality, and poultry processing industries. Mary Bauer, "Under Siege: Life for Low-income Latinos in the South," Southern Poverty Law Center (April 2009).[5]

At current enforcement levels, the United States Department of Labor, tasked with enforcing the Fair Labor Standards Act, the Family Medical Leave Act, the Migrant and Seasonal Workers Protection Act, and approximately one hundred seventy-seven other federal laws, is recovering millions of dollars annually for workers despite budgetary restrictions and cuts. Scott Miller, "Revitalizing the FLSA", *Hofstra Labor and Employment Law Journal* 19 (1): 31 (January 2001).[6] This is only a small percentage of the $40 to $60 billion dollars of wages lost annually through wage theft. If this is the extent to which current wage theft is being recovered through public enforcement, billions are left unrecovered for workers to recover on their own through private counsel.

B. *Kentucky Workers Lose More from Wage Theft than Victims of Robberies Suffer in Property Loss*

The Kentucky Labor Cabinet is the agency charged with enforcing wage and hour laws

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[4] Available at:
http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf?nocdn=1.
[5] Available at:
https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/UnderSiege.pdf.
[6] Available at:
http://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1323&context=hlelj.

administratively. As of mid-2014, there were fifteen wage and hour field inspectors to cover the 1.9 million wage-earners in Kentucky. This means there is approximately one investigator for every 126,600 workers. But the Labor Cabinet may be about to experience significant cuts, along with all other executive level Cabinets. Governor Bevin recently announced his biennial budget, which included a four and one half percent cut for the remainder of this fiscal year and nine percent cuts over the two year budget. *See* John Cheves, "Bevin Proposes $650 Million in Spending Cuts," *The Lexington Herald Leader* (Jan. 26, 2016).[7] The Labor Cabinet will be subject to those cuts under the proposed budget. It is difficult to fathom a scenario in which wage and hour enforcement would not be affected by such significant cuts.

Employees are better off having their home robbed and suffering significant property loss than they are if they work for an unsavory employer who steals wages. Money taken in Kentucky during all robberies combined fell well short of the total amount of wages improperly withheld from Kentucky's workers from 2011-2013. "Wage Theft in Kentucky is More Than Double All Types of Robbery Combined," Commonwealth of Kentucky Labor Cabinet (2014).[8] The Kentucky Labor Cabinet collected an average of $4.5 million each year in wage restitution for employees during that time, which far surpassed the average annual amount of $2 million taken during all robberies in the Commonwealth. The Labor Cabinet compiled the report using the Kentucky State Police's annual report, *Crime in Kentucky*, to compare robbery totals to the latest wage restitution amounts in Kentucky for 2011-2013. Robbery totals did not include burglaries. *Id.*

In addition, the number of wage theft victims also far exceeded robbery victims. For all robberies in Kentucky, including banks, chain and convenience stores, homes, commercial offices,

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[7] Available at: http://www.kentucky.com/news/politics-government/article56717773.html.
[8] Available at:http://www.labor.ky.gov/labornews/Press%20Releases/WageTheftinKentucky.pdf.

highway/street and miscellaneous robberies, there were 5,813 offenses combined during the last three years, for an average of 1,937 a year. For wage theft from 2011-2013, there were 36,794 employees who were victims, for an average of 12,264 each year. *Id.*

C. *Low Wage Workers will Suffer Significant Financial, Procedural and Accessibility Obstacles Without Class or Collective Action Availability*

Low-wage workers live paycheck to paycheck and have very little savings, leaving nothing set aside for a financial crisis. Spending money they do have to pursue wages they should have received is not economically feasible. With little discretionary funds to pursue their employer, workers are left with nothing but the injustice of theft without restitution. Kentucky's civil legal aid programs rarely represent individuals in these types of cases due to limited resources and the prohibition on class action litigation for Legal Services Corporation funded entities. *See* 45 C.F.R. § 1617.3 (1996).

Without counsel, the courthouse door is closed. No single individual, even one with a very solid claim to lost wages, can navigate the court system *pro se*. Not being able to afford an attorney at even a modest hourly rate puts both the attorney and the client at an economic disadvantage. Individuals cannot pay litigation expenses up front, such as the filing fee, deposition costs, expert fees and more. Losing even more money by missing work for discovery depositions and court appearances in order to pursue lost wages is impractical due to the inflexible nature of low wage hourly work.

The standard alternative for the client who cannot pay an hourly fee is to find an attorney to take the case on a contingency fee basis. However, wage and hour claims, especially when considered separately in the low wage worker sector, are typically smaller than the average personal injury claim. This makes the time and expense of prosecuting wage and hour claims not economically feasible for the vast majority of practicing attorneys. The litigation risk taken into

account in all types of litigation means that even individuals with compelling wage and hour claims may settle for less than their claims are worth due to the uncertain nature of a jury trial. Without accessibility to the courts and a meaningful financial incentive for private attorneys, unlawfully withheld wages go unclaimed. Wage theft persists when employers perceive little or no threat of challenge or recovery.

Class action claims make sense for all the reasons that individual claims or joinder do not. Individuals who are motivated to pursue claims for a class can represent all plaintiffs. All of the costs associated with wage and hour litigation are covered by class counsel able to bear the expense. Wage and hour law is specialized and complex, and class action availability ensures that competent and experienced counsel can be obtained by all. Statutory attorneys' fees for the long hours and sometimes years required to conclude litigation can be made commensurate with the recovery for the class. Risks of litigation between plaintiffs and defendants are likewise in balance. As the United States Supreme Court observed:

> "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."

Amchem Products, Inc., v. Windsor, 521 U.S. 591, 617 (1997).

II. WHEN FACED WITH SIMILAR STATUTORY LANGUAGE, OTHER STATES HAVE PERMITTED WAGE AND HOUR CLASS ACTIONS BY DEFERRING TO THE RULES OF CIVIL PROCEDURE

The Court of Appeals was incorrect when it determined that KRS § 337.385 does not, as a matter of law, permit employees to bring wage and hour class actions. Rather, KRS § 337.385 neither expressly permits class actions nor expressly prohibits them. The statute reads:"[s]uch action may be maintained in any court of competent jurisdiction by any one (1) or more employees

for and in behalf of himself, herself, or themselves." K.R.S. § 337.385. The Court of Appeals held that the language in the statute does not permit employees to bring class actions because the phrase "or other employees similarly situated" is absent from the statute's language. *McCann v. Sullivan Univ. Sys., Inc.*, No. 2014-CA-000392-ME, 2015 WL 832280, at 3 (Ky. Ct. App. Feb. 27, 2015), *review granted* (Oct. 21, 2015). The court erred because there is simply no reason to presume a bar on wage and hour class actions because the "similarly situated" language is not in the statute.

Around the country, other courts have encountered similar language in their state wage and hour statutes and have certified wage and hour class actions based upon either Federal Rule of Civil Procedure 23 (Rule 23) or the state equivalent. The majority of states have certified wage and hour class actions. *See* Gregory K. McGillivary, *Wage and Hour Laws: A State-by-State Survey* (2d ed. 2011). Of the many states that allow wage and hour class actions, at least nine of them do so despite there being no clear expression of intent to allow them in the statute. The cases in these other states reveal a pattern of permitting class actions under similar statutory framework.

California courts provide an illustrative example and have certified many wage and hour class actions in the past several years. The applicable statute states:

> "[A]ny employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation."

Cal. Lab. Code § 1194(a). In 2004, the California Supreme Court confirmed that wage and hour class actions may be certified, in a case alleging employer misclassification. *Reynolds v. Bement*, 116 P.3d 1162, 1166 n.1 (Cal. 2005), *abrogated on other grounds by Martinez v. Combs*, 231 P.3d 259 (Cal. 2010) (citing *Sav-on Drug Stores, Inc. v. Superior Court*, 96 P.3d 194 (Cal. 2004)). In fact, the California Court of Appeals pointed out that "it is no accident that wage and hour disputes (and others in the same general class) routinely proceed as class actions." *Ghazaryan v. Diva*

Limousine, Ltd., 87 Cal. Rptr. 3d 518, 529 (Cal. Ct. App. 2008) (quotations omitted). California has a policy of encouraging class actions so as to fulfill their wage and hour statutes, which are remedial. *Id.* "[T]he class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." *Sav-on Drug Stores, Inc.*, 96 P.3d at 209 (quotations omitted). In certifying classes in wage and hour cases, courts simply look to the requirements under California's Code of Civil Procedure § 382 or Rule 23, under which the court examines such factors as commonality, typicality, and numerosity. *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1052 (9th Cir. 2015).

New Hampshire's statute has received a lot of attention for failing to mention that an employee may bring a claim for others "similarly situated," yet the courts have determined that wage and hour class actions are permitted. The statute reads "[a]ction by an employee to recover unpaid wages and/or liquidated damages may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves, or such employee or employees may designate an agent or representative to maintain such action." N.H. Rev. Stat. Ann. § 275:53(I). While the statute does not mention class actions, a Massachusetts federal court interpreting New Hampshire law rejected the idea that the statute was designed to exclude class actions. *Garcia v. E.J. Amusements of New Hampshire, Inc.*, 98 F. Supp. 3d 277, 283–84 (D. Mass. 2015). In that case, much like in the instant case, the defendants argued that because the words "on behalf of those similarly situated" were not used in the statute, wage and hour class actions were barred. *Id.* In the decision, which is currently under appeal, the court rejected this argument, stating that the statute's language merely expands the types of actions which may be brought rather than limiting them. *Id.* at 284. Both New York and Indiana federal courts have examined the New

Hampshire statute and have come to the same conclusion. *Teoba v. Trugreen Landcare LLC*, 769 F. Supp. 2d 175, 188 (W.D.N.Y. 2011); *In re FedEx Ground Package Sys., Inc., Employment Practices Litig.*, 283 F.R.D. 427, 471 (N.D. Ind. 2012).

Connecticut courts have also certified wage and hour class actions, despite express language in the statute. The statute reads "[i]f any employee is paid by his or her employer less than the minimum fair wage or overtime wage to which he or she is entitled … he or she shall recover, in a civil action." Conn. Gen. Stat. Ann. § 31-68(a). In *Scott v. Aetna Services, Inc.*, the court examined whether class certification was appropriate by looking to Rule 23, and determining that the numerosity, commonality, typicality, and adequate representation elements had been met. 210 F.R.D. 261, 266–67 (D. Conn. 2002). The court did so without doubt as to whether the statute allowed class actions as a matter of law. *Id.* Similarly in New York, the statute reads "[i]f any employee is paid by his or her employer less than the wage to which he or she is entitled under the provisions of this article, he or she shall recover in a civil action the amount of any such underpayments." N.Y. Lab. Law § 663(1). New York courts look to the requirements under Rule 23. *Indergit v. Rite Aid Corp.*, 293 F.R.D. 632, 658 (S.D.N.Y. 2013).

Iowa courts have determined that wage and hour class actions are permissible. Their statute reads, in relevant part, "[w]hen it has been shown that an employer has … failed to pay an employee wages … the employer shall be liable to the employee for any wages or expenses." Iowa Code Ann. § 91A.8. In determining whether class certification is appropriate, the courts examine only whether the putative class meets the requirements under Rule 23. *Bouaphakeo v. Tyson Foods, Inc.*, 564 F. Supp. 2d 870, 909 (N.D. Iowa 2008). In Iowa, it does not matter that the statute does not expressly permit such class actions, but only that the numerosity, commonality, typicality,

and adequate representation elements of Rule 23 are met. *See Bartleson v. Winnebago Indus., Inc.*, 219 F.R.D. 629, 638 (N.D. Iowa 2003).

Illinois courts certify wage and hour class actions pursuant to their rules of civil procedure. The Illinois statute reads "[i]f any employee is paid by his employer less than the wage to which he is entitled under the provisions of this Act, the employee may recover in a civil action the amount of any such underpayments." 820 Ill. Comp. Stat. Ann. 105/12(a). While Illinois courts have never addressed whether class certification is appropriate as a matter of law, the courts have certified wage and hour classes based on the requirements of Rule 23. *See, e.g., Driver v. AppleIllinois, LLC*, 265 F.R.D. 293, 299–301 (N.D. Ill. 2010). Similarly, Maine courts have been routinely certifying classes without express authority. *See Scovil v. FedEx Ground Package Sys., Inc.*, No. 1:10-CV-515-DBH, 2014 WL 1057079, at 1 (D. Me. 2014). In certifying classes, the courts look to Maine's rules of civil procedure. *Prescott v. Prudential Ins. Co.*, 729 F. Supp. 2d 357, 363 (D. Me. 2010).

Minnesota courts have determined that wage and hour class actions are permitted so long as they meet the requirements of Rule 23. The Minnesota statute reads "[a] person may bring a civil action seeking redress for violations … directly to district court." Minn. Stat. Ann. § 181.171. Despite the use of the singular "person," Minnesota courts certify wage and hour classes on a regular basis. *See Rios v. Jennie-O Turkey Store, Inc.*, 793 N.W.2d 309, 311 (Minn. Ct. App. 2011); *Erdman v. Life Time Fitness, Inc.*, 771 N.W.2d 58, 59 (Minn. Ct. App. 2009), *aff'd*, 788 N.W.2d 50 (Minn. 2010), *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 612 (Minn. 2008).

Washington courts have found that wage and hour class actions may be certified, so long as they meet the requirements of the rules of civil procedure. The Washington statute reads "[a]ny employer who pays any employee less than wages to which such employee is entitled under or by

virtue of this chapter, shall be liable to such employee affected for the full amount of such wage rate." Wash. Rev. Code Ann. § 49.46.090(1). Despite no statutory language expressly allowing for class actions, Washington courts have allowed them, provided they meet the requirements of Rule 23. *Miller v. Farmer Bros. Co.*, 64 P.3d 49 (Wash. Ct. App. 2003).

After examining the cases in these other states, it is easy to see a pattern. In states where wage and hour class actions are neither expressly permitted nor prohibited, courts find that they are permitted. Likewise, Kentucky should rely upon the established rules of civil procedure and permit wage and hour class actions.

III. PERMITTING CLASS ACTIONS IN WAGE AND HOUR CASES IS IN LINE WITH KENTUCKY'S POLICY OF "FUNDAMENTAL FAIRNESS" IN ADDRESSING CITIZENS' RIGHTS

The Kentucky Constitution, § 14, reads as follows:

> All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

The Kentucky Supreme Court has stated that the primary concern in interpreting our statutes as they affect access to the courts is fundamental fairness: "[f]undamental fairness is part and parcel of the concept underlying the rights guaranteed to us by our constitution; and, conversely, the various sections in it protecting individual rights from legislative interference cannot be understood or applied without reference to fundamental fairness." *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 816 (Ky. 1991). Fundamentally, barring class actions in wage and hour suits closes the courts to some Kentuckians. It is unrealistic to conclude that all of these individuals could address their issues through the Labor Cabinet or private, individual suit. Allowing private attorneys to also aid in the fight against wage theft by pursuing class claims ensures our courts are truly open.

Other courts have noted the critical importance of class availability to individual citizens. For example, in the case of *Paley v. Coca-Cola,* 389 Mich. 583, 209 N.W.2d 232 (1973), for example, the Michigan Supreme Court was faced with a jurisdictional question. The question presented to the court was whether Paley, whose individual damages were $100, could maintain a class action in a Michigan Circuit Court. The court framed the dispute as one of statutory interpretation together with Michigan's constitution and the nature of a class action. The *Paley* Court summarized how critical it is in the modern world to ensure that potential class claims can be brought, observing as follows:

> We live in a world where too many individuals often find their environment confusing, if not hostile. They feel like a number or a bit in a massive impersonal computer. All around them they are confronted by giant powers, big government, big corporations, big unions. They feel they have no control over, or even voice in what goes on. The law also seems strange and unfriendly. For too many the law seems like part of the problem instead of part of the solution…..The class action certainly is not a solution to all things. But in some areas, at least, it is a breath of hope -- a chance to cope. It gives scattered individuals with a common problem an instrument to try and deal with their problem. It has been particularly helpful for one of today's most beleaguered and disaffected groups -- the consumer. It is a kind of better slingshot for the modern David to tackle Goliath with….

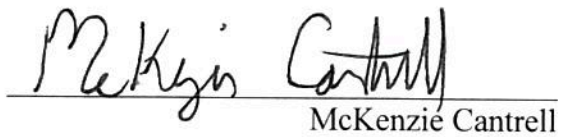
Id. at 594-596. While the present case concerns wage and hour issues, as opposed to consumer issues, *Paley*'s description of the class action as David's slingshot is certainly appropriate. The lower court's ruling takes away one of the only weapons available to low wage workers in Kentucky to seek redress, despite no indication from the legislature that it intended such an unfair result.

IV. CONCLUSION

For the foregoing reasons, and those presented in the briefs of Appellees and Appellant, *amici curiae* respectfully requests that this Court reverse the Kentucky Court of Appeal's ruling limiting the availability of class and collective action under KRS Chapter 337. If allowed to stand, this

ruling will result in a less efficient court system and a system that already presents obstacles to low income litigants. The Court of Appeal's reasoning is also incompatible with the well-reasoned analysis of other courts (including the United States Supreme Court) that have addressed potential conflicts between statutory language and Rule 23 class actions.

Respectfully submitted,



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